Abdul Rahim Ponniah bin Abdullah v Kulim Intensive Driving Centre Sdn Bhd

HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 22–140 OF 1997
ALAUDDIN J
16 JULY 2000

Civil Procedure *— Time — Extension of — Filing of appearance, statement of defence and affidavit in reply — Discretion of court to be exercised judicially — Factors to be considered — Negotiation between parties — Merits in defence — Whether reasonable excuse for delay*

The plaintiff was a member of the defendant company. Despite numerous request from the plaintiff, the defendant failed to furnish its loss and profit accounts and financial statements to its Annual General Meeting. The plaintiff then filed a suit against the defendant. The defendant again failed to file its appearance and statement of defence. Subsequently, the plaintiff apply for an order that default judgment be entered against the defendant. The defendant filed an application for leave and extension of time to file their appearance, statement of defence and affidavit in reply to the plaintiff's application.

Held, allowing the defendant's application:

(1) The discretion of the court to extend time under O 3 r 5 of the Rules of the High Court 1980 ('the RHC') must be exercised judicially and only in cases where there are merits. In exercising its discretion, the following factors will be considered: (i) whether the delay caused by the defendant company is unjustified or unreasonable; (ii) what are the reasons for the delay; (iii) whether the defence raised by the defendant company has any merits; and (iv) will the plaintiff be prejudiced in any way should the application be granted (see p 588A, F–G).

(2) Since it was the plaintiff who offered to settle the matter immediately after he had filed the writ and there was in fact a negotiation between the parties to that effect, the defendant had no option but to delay the filing of their appearance and defence. Therefore, this amounted to a reasonable excuse on the part of the defendant for the delay (see p 589B–C).

(3) From the evidence presented by the defendant, there were merits in their defence. The plaintiff would not be prejudiced in any way by the grant of extension of time to the defendant (see p 590D–E).

[Bahasa Malaysia summary

Plaintif merupakan seorang ahli syarikat defendan. Meskipun plaintif telah banyak kali membuat permintaan, defendan telah gagal untuk

menyediakan akaun-akaun kerugian dan keuntungan serta pernyataan kewangan mereka kepada Mesyuarat Agung Tahunan. Plaintif kemudiannya memfailkan satu guaman terhadap defendan. Defendan sekali lagi gagal memfailkan kehadiran dan pernyataan pembelaannya. Seterusnya, plaintif memohon untuk satu perintah agar penghakiman ingkar dimasukkan terhadap defendan. Defendan telah memfailkan satu permohonan untuk kebenaran dan perlanjutan masa untuk memfailkan kehadiran, pernyataan pembelaan dan afidavit jawapan kepada permohonan plaintif.

Diputuskan, membenarkan permohonan defendan:

(1) Budi bicara mahkamah untuk melanjutkan masa di bawah A 3 k 5 Kaedah-Kaedah Mahkamah Tinggi 1980 mestilah dilaksanakan secara saksama dan hanya dalam kes di mana terdapat merit. Dalam melaksanakan budi bicaranya, faktor-faktor berikut akan dipertimbangkan: (i) sama ada kelewatan yang disebabkan oleh syarikat defendan adalah tanpa justifikasi atau tidak munasabah; (ii) apakah alasan-alasan untuk kelewatan tersebut; (iii) sama ada pembelaan yang dibangkitkan oleh syarikat defendan mempunyai sebarang merit; dan (iv) adakah plaintif akan terjejas dalam apa-apa cara sekiranya permohonan dibenarkan (lihat ms 588A, 588F–G).

(2) Oleh kerana plaintif merupakan pihak yang telah membuat tawaran untuk menyelesaikan perkara tersebut sebaik sahaja beliau memfailkan writ dan perundingan memang telah diadakan di antara pihak-pihak untuk tujuan ini, defendan tidak mempunyai pilihan lain kecuali menangguhkan pemfailan kehadiran dan pembelaan mereka. Maka, ini berjumlah kepada alasan yang munasabah pada pihak defendan untuk kelewatan tersebut (lihat ms 589B–C).

(3) Daripada keterangan yang dikemukakan oleh defendan, wujudnya merit dalam pembelaan mereka. Plaintif tidak akan terjejas dalam apa-apa cara melalui kebenaran perlanjutan masa kepada defendan (lihat ms 590D–E).]

Notes

For cases on extension of time, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4857–4877.

Cases referred to

Batang Kali Estates Sdn Bhd v Romani bte Abdul Aziz & Anor [1993] 2 MLJ 267 (refd)

Development & Commercial Bank Bhd v Tan Ong Hwa [1992] 2 MLJ 764 (refd)

Scott & English (M) Sdn Bhd v Leikie Refrigeration & Stainless Steel Industries Sdn Bhd & Ors [1994] 2 MLJ 424 (refd)

Legislation referred to

Rules of the High Court 1980 O 3 r 5(1), O 3 r 5(2), O 12 r 4, O 18 r 2(1), O 19 r 7(1)

Supramaniam a/l Kasia Pillai (*Supramaniam & Co*) for the plaintiff.
Jeevah a/l Subramaniam (*Paul Chong & Co*) for the defendant.

Alauddin J: Before this court there are two applications to be heard. Enclosure 3 is an application by the plaintiff under O 19 r 7(1) of the Rules of the High Court 1980 ('the RHC') for an order that default judgment be entered against the defendant for failure to file their statement of defence.

Enclosure 8 is an application by the defendant for leave to file their memorandum of appearance and statement of defence out of time. They also apply for an extension of time to file the affidavit in reply to the plaintiff's application at encl 3.

Background facts

The plaintiff claims that as a member — of the defendant company he had invested a sum of RM10,000 towards its capital. The defendant company carries its business under the style of Kulim Intensive Driving Centre Sdn Bhd and has its registered office at No 507, Jalan Cengai Hijau, Taman Bersatu, 09000 Kulim, Kedah. The defendant company's main activity is to train and give driving lessons to motor vehicle drivers in preparation for their applications for valid driving licences from the Road Transport Department. It is also registered with the Road Transport Department, for that purpose.

The defendant company started its business in 1994 and since then, according to the plaintiff, claims that it has, never prepared its 'loss and profit' account and table it before its members. Neither had the defendant company filed the same with the Registrar of Companies.

It is further alleged by the plaintiff that the defendant company had made huge profits prior to its cessation in 1996. The said profits, according to him was deposited in its current account with the Public Bank Bhd at Kulim.

Further, the plaintiff claims that the managing director and its other directors had intended to wind up the defendant company and transfer its assets and profits to a new company to be formed by them. The plaintiff believes that he will have no place in the new company.

In order to safeguard his interest in the defendant company and for fear that the profits would be mismanaged by the directors, the plaintiff had repeatedly sent written notices to the defendant company requesting it to submit its 'loss and profit' accounts and financial statements to its Annual General Meeting. The defendant company had completely ignored the plaintiff's request. The plaintiff, being disgusted with the defendant company's attitude, had filed this suit in court claiming amongst others the following order:

A (i) suatu perintah injunksi melarang defendan melalui pekerja, agen, ahli-ahli lembaga pengarah atau lain-lain pihak daripada berurusan dengan akaun syarikat defendan di Public Bank, Cawangan Kulim, Kedah;

(ii) suatu perintah injunksi melarang syarikat defendan daripada digulung;

B (iii) suatu perintah bahawa syarikat defendan menyediakan penyata kewangan bagi tahun berakhir September 1995 dan September 1996 dan membentangkannya di mesyuarat agung syarikat defendan dan memfailkannya dengan Pendaftar Syarikat Malaysia.

The writ and the statement of claim was served on the defendant company by way of registered post on 28 November 1997. The defendant company, however did not file its appearance and statement of defence. Thereafter, the plaintiff filed a notice of motion, ie encl 3, to enter default judgment against the defendant company, in accordance with O 19 r 7(1) of the RHC. Enclosure 3 was served on the defendant company.

Soon after the receipt of encl 3, the defendant company on 14 July 1998, filed an application by way of summons in chambers ie encl 8 for leave and extension of time to file their appearance, statement of defence and affidavit in reply to the plaintiff's application at encl 3. Hence the two applications before this court.

Findings of court

For the sake of justice and convenience, I consider it appropriate to decide on encl 8 first.

In encl 8, the defendant company applies for leave and extension of time to file its appearance and statement of defence, against the plaintiff's action. Now, in accordance with O 12 r 4 of the RHC any party who intends to defend an action against him, must, firstly, enter appearance within eight days after service of the writ on him. Thereafter, in accordance with O 18 r 2(1) of the RHC he has to serve a defence on the plaintiff before the expiration of 14 days after the time limited for appearing or after the statement of claim is served on him, whichever is the later.

From the above it would appear that the defendant had failed to follow the procedure as provided for by the RHC. It follows therefore that it is precluded from filing its appearance and statement of defence, except, with leave of court.

Order 3 r 5(1) and (2) of the RHC provides as follows:

(1) The court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules or by any judgment, order or direction, to do any act in any proceedings.

(2) The court may extend any such period as is referred to in para (1) although the application for extension is not made until after the expiration of that period.

I The object of the rule is, of course, to give to the court a discretion to extend time with a view to the avoidance of injustice to the parties. It being a discretionary power, the court will have to exercise it judicially.

There are numerous decided cases which deal with the courts' discretionary power to extend time under O 3 r 5 of the RHC. However, I do not propose to deal with them one by one. Suffice it for me to say that all these decisions reveal one very important factor ie the discretionary power of the court should only be exercised in cases where there are merits. I would also observe that the guidelines applicable in cases of applications for extension of time to file an appeal are equally applicable in this application.

In dealing with an application for extension of time to appeal in the case of *Scott & English (M) Sdn Bhd v Leikie Refrigeration & Stainless Steel Industries Sdn Bhd & Ors* [1994] 2 MLJ 424, Chong Siew Fai J (as he then was) observed as follows (at p 424):

> The grant of extension of time to appeal is a matter of discretion for the court. The following are factors normally to be considered:
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> (1) the length of the delay;
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> (2) the reasons for the delay;
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> (3) the chances of the appeal succeeding if time for appealing is extended; and
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> (4) the degree of prejudice to the potential respondent if the application is granted.

These factors are merely a framework or guide for the purpose of exercising the discretion and are not intended to be rigid mandatory requirements. It is not necessary that all the four factors must be in favour of an applicant in order that the discretion may be exercised to the applicant's benefit (see also *Development & Commercial Bank Bhd v Tan Ong Hwa* [1992] 2 MLJ 764 and *Batang Kali Estates Sdn Bhd v Romani bte Abdul Aziz & Anor* [1993] 2 MLJ 267).

Reverting to the application before this court and adopting the above observation I will now have to decide the following factors:

(1) is the delay caused by the defendant company unjustified or unreasonable?;

(2) what are the reasons for the delay?;

(3) does the defendant company have a good defence?;

(4) will the plaintiff be prejudiced in any way should the application be granted?

The defendant company in this case had filed this application about seven months after service of the writ on them. Encik Ho Wai Oon, the managing director of the defendant company, in his affidavit supporting the application had explained as to why there was a delay on their part to file the appearance and defence. According to him, as a result of the plaintiff's offer to settle the matter, the parties embarked upon a negotiation for a settlement. The offer was made by the plaintiff himself after they were served with the writ. Following the offer made by the plaintiff a meeting was arranged between the plaintiff and Tan Ah Ba, a member of the defendant company, at the latter's office. Tan Boon Liang, another member of the

defendant company was also present at the meeting. At that meeting which took place in April 1998, the plaintiff verbally intimated the terms of the settlement to both Tan Ah Ba and Tan Boon Liang. Unfortunately, the settlement failed to materialize as the defendant company had rejected the terms offered by the plaintiff.

Although the plaintiff had never denied that these was a negotiation for a settlement, he, nevertheless, alleged that the defendant company was not serious about settling the matter.

To my mind, since it was the plaintiff who offered to settle the matter immediately after he had filed the writ and there was in fact a negotiation between the parties to that effect, the defendant company had no option but to delay the filing of their appearance and defence. This, I would say is a reasonable excuse on the part of the defendant company for the delay. Since the negotiation had broken down between the parties the defendant company is left with no choice but to turn to the court to defend the plaintiff's claim.

I need to mention here that although the plaintiff had filed the notice of motion in March 1998, he had agreed to meet the defendant company to negotiate for a settlement in April 1998 ie almost immediately after he had filed the notice of motion. By doing this it clearly shows that the plaintiff had in fact wanted the matter settled out of court. The delay, therefore, which had resulted from the negotiation between the parties cannot solely be attributed to the defendant company. As a matter of fact the plaintiff had also contributed to the delay.

Next, I will have to consider whether the defence raised by the defendant company has any merits.

In his notice of motion the plaintiff had prayed for an order for injunction to restrain the defendant company from dealing with its account at Public Bank, Kulim. The plaintiff further prayed for an order that the defendant company prepare its financial statements for the years ending September 1995 and September 1996 and table them at its Annual General Meeting and file them with the Registrar of Company. In other words, the basis of the plaintiff's claim, therefore, lies in the failure of the defendant company to prepare its financial statements and manage its business properly, which according to the plaintiff had prejudiced his interest in the company. The plaintiff had also expressed his fear that the defendant company would misuse its funds.

On the other hand, in their affidavit supporting the application the defendant company had explained that the accounts for the years 1995, 1996 and 1997 had in fact been prepared and the account for the year 1999 had been audited. In their further affidavit dated 9 February 1999, sworn by one Mohamed Jafary bin Othman, one of the directors, the defendant company confirmed that the accounts for the years ending 31 October 1995, 1996 and 1997 had in fact been audited and tabled before the Annual General Meeting held on 5 November 1998. That being so, I would therefore agree with the submission of learned counsel for the defendant company that the order to compel the defendant company to prepare its

financial statements as requested by the plaintiff is totally irrelevant and misplaced. A

The defendant company had also stated in their affidavit that there was a resolution to the effect that any withdrawal of money from the company's account must have the approval of at least two directors out of the three appointed for the purpose. I would therefore hold that the plaintiff's fear that the defendant company would mismanage its fund is unfounded. Hence, an order for an injunction to restrain the defendant company through its employees, agents, board members etc from dealing with its accounts at the Public Bank, without considering the defendant company's defence is most unreasonable and unjustified and cannot be considered. The grant of an order for an injunction is a matter of law and it can only be allowed after all the facts and circumstances of the case, including the defence, has been considered. B C

As to whether the defendant company can be wound up, the issue is certainly related to matters pertaining to the settlement of its accounts and I believe it can be resolved within the company. From the affidavit of Mohamed Jafary including the statement of account exhibited, I must respectfully say that there are merits in the defence. D

The last factor to be considered is whether the plaintiff would be unduly prejudiced if the defendant company's application for extension of time is allowed. Frankly, from the facts of this case I cannot see how the plaintiff can be prejudiced in any way. E

Decision

In my judgment, I find that there are merits in the defendant company's defence. Based on the above reasons I would allow the defendant company's application (encl 8) with a direction that they file their statement of defence within 14 days from the date of this order. The defendant company will pay the costs of this application. F

In view of the order I have already made above, the plaintiff's notice of motion (encl 3) becomes irrelevant. I would therefore dismiss encl 3 with no order as to costs. G

Defendant's application allowed.

Reported by Wong Siok Chin

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